QUESTION PRESENTED

Whether the Sentencing Commission permissibly implemented the statutory mandate to sentence certain "categories of" repeat offenders "at or near the maximum term authorized" in defining the term "Offense Statutory Maximum" as used in the Guidelines' Career Offender provision, § 4B1.1.

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INTEREST OF AMICI[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded over 25 years ago to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among NACDL's objectives is to ensure the proper administration of criminal justice and to promote fair and consistent application of sentencing laws. Thus, NACDL has a vital interest in ensuring that federal sentencing statutes are construed in a manner that will allow sentencing courts to impose appropriate and just sentences.

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan, educational association that conducts research and does advocacy work regarding the cost of mandatory minimum sentencing in terms of public expenditures, perpetuation of unwarranted and unjust sentencing disparities, and the transfer of the sentencing function from the judiciary to the prosecution. Founded in

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[1] This *amicus curiae* brief is filed pursuant to Rule 37 of the Rules of the Supreme Court of the United States. The petitioner and respondents have consented to the filing of this brief, and amici have filed the letters of consent with the Clerk of the Court.

1991, FAMM has 33,103 members nationwide with 36 chapters in 26 states and the District of Columbia. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for *pro bono* litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime.

SUMMARY OF ARGUMENT

The Sentencing Commission's amended definition of the term "Offense Statutory Maximum" in the Sentencing Guideline's Career Offender provision, U.S.S.G. § 4B1.1 (Nov. 1995),[2] represents a thoroughly reasonable interpretation of the legislative mandate to sentence certain "categories of defendants" "at or near the maximum term authorized."

Amendment 506 to the Sentencing Guidelines clarified that, for the purposes of the Career Offender provision, a career offender's "offense level" should be calculated based on the predicate offense's statutory maximum sentence unenhanced by any recidivist provisions in those predicate offense statutes. U.S.S.G. § 4B1.1, comment. (n.2). The Sentencing Commission explained that "[t]his rule avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced

[2] All citations to the U.S. Sentencing Guidelines are to the November 1995 edition unless otherwise noted.

penalties based on prior convictions." U.S.S.G. App. C, Amend. 506, at 805 (Nov. 1994). This explanation demonstrates that the Commission's actions were aimed at reducing unwarranted disparities and reining in unfettered prosecutorial discretion in sentencing, thereby conforming the guidelines to the central goals of the Sentencing Reform Act of 1984. The Commission stands by the propriety of its amendment.[3]

Contrary to the Government's position, the statutory language of 28 U.S.C. § 994(h) does not mandate, unambiguously, that career offenders have their "offense level" within the career offender guideline established based on an enhanced statutory maximum, in those cases in which a prosecutor chooses to charge a defendant with those enhancements. Rather, this statutory language is susceptible to several plausible interpretations and the Commission

[3] The Commission expressed its continued support of Amendment 506 in a letter to FAMM President, Julie Stewart, in which the Commission's General Counsel wrote:

> The Sentencing Commission continues to have a keen interest in [the validity of Amendment 506 to the sentencing guidelines]. . . . [W]e have every confidence that the important issues in these cases will be well developed and effectively presented to the Court. Moreover, there appears to be no significant divergence of interests between the individual defendants and the Commission in regard to the validity of this particular amendment. Thus, the Commission has not felt it necessary to pursue formal intervention in this litigation.

(Letter from John R. Steer, General Counsel, United States Sentencing Comm'n (Sept. 20, 1996); attached hereto as Appendix A.) Ironically, in this case, the Solicitor General's office has opted to take a position against the interests of the Commission, an entity that, under other circumstances, the Solicitor General would represent. *See, e.g., Mistretta v. United States*, 488 U.S. 361 (1989).

appropriately exercised its authority in choosing among these competing interpretations.

The Commission's interpretation of § 994 requires that all those convicted of a qualifying offense who possess a qualifying criminal history, have their career offender "offense level" based on the maximum sentence that applies to all such defendants, that is, the unenhanced statutory maximum. This interpretation removes the "unwarranted disparities" that would otherwise arise from a prosecutorial decision to seek an enhancement in some cases, but not in others, where the defendants have identical criminal histories. Moreover, Congress intended comparable treatment for those "categories of defendants" charged with *either* a violent felony *or* a serious drug offense, who had previously been convicted of two or more qualifying felonies. Under the Government's interpretation, contrary to that congressional directive, a sub-set of these defendants could be sentenced based on an enhanced statutory maximum.

Further, the language and legislative history of the Sentencing Reform Act of 1984 support the Commission's interpretation of its statutory mandate in this case. The congressional decision to reform federal sentencing procedures reflected a great dissatisfaction with sentencing disparities among similarly situated defendants. Congress observed, "[t]his disparity is fair neither to the offenders nor to the public." S. Rep. No. 225, 98th Cong., 2d Sess. 49 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3232. The guidelines reflect the Sentencing Commission's effort to "solve both the practical and

philosophical problems of developing a coherent sentencing system[,]" to achieve "a more honest, uniform, equitable, proportional, and therefore effective sentencing system." U.S.S.G. Ch. 1, Pt.A, intro. comment. at 3, 4. The Career Offender provision fits within this comprehensive scheme, and works to respond fairly to the array of factors involved in the sentencing decision.

Finally, the Amendment reduces unfairness. The Commission's mode of calculating a career offender's offense level prevents unfair double counting, while the Government's position would have the criminal histories of some defendants counted against them twice, once *via* the statutory enhancement, and a second time by means of the enhancement inherent in § 4B1.1. In addition, the Commission's approach reduces the exercise of *ad hoc* prosecutorial discretion to insure that defendants with similar criminal histories, convicted of similar offenses will be treated similarly. Fairness and uniform treatment were to be the hallmark of sentencing reform and the Commission's efforts towards these ends should not be stymied.

Part I, below, highlights the language and legislative history of the Sentencing Reform Act of 1984, Pub. L. 98-473, tit. II, 98 Stat. 1837 (1984) (codified as amended in scattered sections of 18 & 28 U.S.C.), as well as the evolution of the Career Offender provision, all of which support and contextualize the Commission's interpretation of its statutory mandate.

Part II, below, examines the language of 28 U.S.C. § 994(h), demonstrates that that language is ambiguous, and

illustrates that Amendment 506 represents a permissible, indeed a sensible and coherent, construction of that language.

ARGUMENT

I. The Language and Legislative History of the Sentencing Reform Act, and the Evolution of Amendment 506, Support the Commission's Approach to Setting the Offense Levels for Career Offenders.

A. The Sentencing Reform Act's Language and Legislative History Reveal that Congress Delegated Substantial Authority to the Sentencing Commission to Develop a Comprehensive Approach to the Treatment of Repeat Offenders.

The Sentencing Reform Act of 1984 effected a sea of change in federal sentencing, replacing a system wrought with disparities with one seeking fair and uniform treatment of those convicted of federal crimes. As explained in the legislative history of the Act:

> The bill creates a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently. This approach will *eliminate specialized sentencing statutes that cover narrow classes of offenders*[.] . . . The sentencing guidelines will recommend to the sentencing judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender.

S. Rep. No. 225, 98th Cong., 2d Sess. 51 (1983) (footnote omitted, emphasis added), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3234.

Mindful of the complexity of the task it set out, Congress created the Sentencing Commission to "establish sentencing policies and practices" that satisfy the articulated purposes of sentencing,[4] and "provide certainty and fairness[,] . . . avoiding unwarranted sentencing disparities[.]" 28 U.S.C. § 991(b). The legislative history reflects the substantial public trust placed in the Commission when it takes note of "the extraordinary powers and responsibilities vested in the Commission, as well as the enormous potential for unparalleled improvement in the fairness and effectiveness of Federal criminal justice as a whole[.]" S. Rep. No. 225, 98th Cong., 2d Sess. 160 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3343.

To guide the Commission, Congress promulgated a set of directives outlining the "Duties of the Commission." 28 U.S.C. § 994. These directives instructed the Commission to formulate guidelines that would structure sentencing calculations to consider categories of offenses, including aggravating and mitigating factors, as well as categories of offenders, again including appropriate

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[4] Congress directed that sentences imposed should be "sufficient, *but not greater than necessary*" to "reflect the seriousness of the offense," deter criminal conduct, protect the public and provide defendants with "needed educational or vocational training, medical care, or other correctional treatment[.]" 18 U.S.C. § 3553(a) (emphasis added).

aggravating and mitigating factors. 28 U.S.C. § 994(c),(d). The guidelines were to provide "certainty and fairness," § 994(f), and take care to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," § 994(g).[5]

Congress instructed the Commission to use existing sentencing patterns "as a starting point in its development of the initial sets of guidelines for particular categories of cases," § 994(m), but stated unequivocally, that the Commission "shall not be bound by such . . . sentences, and shall *independently develop a sentencing range* that is consistent with the [articulated] purposes of sentencing[,]" *id.* (emphasis added). These instructions demonstrate Congress's expectation that the Commission would depart from past sentencing practices in order to effectuate a more comprehensive and consistent approach to sentencing.

Congress articulated its expectation that recidivist offenders would be subjected to augmented penalties. Among the pertinent directives is § 994(h), which provides:

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and --
> (1) has been convicted of a felony that is --
> (A) a crime of violence; or
> (B) an offense described in [specified controlled substances statutes]; and
> (2) has previously been convicted of two or more prior felonies, each of which is --
> (A) A crime of violence; or
> (B) an offense described in [specified controlled substances statutes].

28 U.S.C. § 994(h). This language forms the basis of the Government's challenge to Amendment 506.

Congress intended that the directive contained in § 994(h) be addressed within the overall context of the sentencing guidelines. As the legislative history explains:

> Subsection (h) was added to the bill . . . to replace a provision . . . that would have mandated a sentencing judge to impose a sentence at or near the statutory maximum for repeat violent offenders and repeat drug offenders. The Committee believes that such a directive to the Sentencing Commission will be more effective; *the guidelines development process can assure consistent and rational implementation of the Committee's view* that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.

S. Rep. No. 225, 98th Cong., 2d Sess. 175 (1983) (emphasis added), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3358. Here again, Congress opted for a scheme that would approach situations involving repeat offenders in a

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[5] The *amici* do not take the position, proposed by respondents, that the mandates contained in § 994 are, essentially, nonjusticiable. Rather, the *amici* take the more limited view that Amendment 506 constitutes a permissible exercise of the Commission's authority when analyzed pursuant to the test set forth in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

uniform manner and within the context of the overall sentencing scheme as developed by the Sentencing Commission.

Congress included other directives targeting recidivism, instructing that an individual's criminal history should be considered in the sentencing calculation, § 994(d)(10), and indicating that certain categories of defendants receive "a substantial term of imprisonment[,]" § 994(i). Significantly, Congress indicated that these "substantial terms of imprisonment" should be secured through a guidelines calculation scheme, not via *ad hoc* statutory enhancements. The legislative history explains:

> [R]ather than providing enhanced sentences above the maximum sentence provided for any other similar offense, as is done in current 18 U.S.C. 3575(b),[6] section 994(i) requires that the guidelines insure a substantial sentence to imprisonment that is nevertheless *within the range generally available* for the offense.

S. Rep. No. 225, 98th Cong., 2d Sess. 176 (1983) (emphasis added) , *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3359. This legislative history supports the conclusion that Congress intended that the guidelines would tackle sentencing in a comprehensive manner.

The Sentencing Commission created the "Career

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[6] Section 3575 of Title 18, repealed by the Sentencing Reform Act, provided for increased sentences for "dangerous special offenders."

Offender" guideline, § 4B1.1, as a part of the overall sentencing scheme. Tracking the statutory directive contained in § 994(h), this guideline defines the category of defendants to which it applies as follows:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1. The guideline then specifies how these offenders should have their "offense level" calculated:

> If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Id. The guideline table sets the offense level based on the "offense statutory maximum." *Id.* The original guideline defined "Offense Statutory Maximum" as "the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense." U.S.S.G. § 4B1.1, comment. (n.2) (Nov. 1987).

After the Guidelines took effect, some courts applying the career offender provision calculated the "offense statutory maximum" by looking to enhanced statutory maximums based on an individual defendant's

criminal history and the prosecutor's charging decision. *See, e.g., United States v. Smith*, 984 F.2d 1084, 1085 (10th Cir.), *cert. denied*, 510 U.S. 873 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-11 (D.C. Cir. 1992); *United States v. Amis*, 926 F.2d 328, 329-30 (3d Cir. 1991). These decisions prompted the Commission to amend its commentary to clarify the guidelines' term "offense statutory maximum."

B. The Commission's Amendment of the Career Offender Guideline Reduces Unwarranted Sentencing Disparities.

The Commission, with congressional approval, revised the commentary to § 4B1.1 *via* Amendment 506 in 1994. Amendment 506 arises naturally from the Commission's authority and duty to periodically "review and revise" the Guidelines. 28 U.S.C. §994(o); *see also Braxton v. United States*, 500 U.S. 344, 348 (1991). As this Court has explained: "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton*, 500 U.S. at 348. Amending the Guidelines is an unexceptional, indeed required, part of the Commission's ongoing function.[7]

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[7] It should be noted that the Attorney General, or her designee, is an *ex officio*, nonvoting member of the Commission. 28 U.S.C. § 991. Therefore, the Department of Justice has a front row seat during guidelines policy development, including amendments, and has more opportunity than others to express its concerns about potential amendments, and if not satisfied with the results at the Commission, to bring its concerns to the attention of Congress.

Amendment 506 clarifies that, for the purposes of § 4B1.1, courts should base the offense level on *unenhanced* statutory maximums. U.S.S.G. § 4B1.1, comment (n.2). The Commission explained that this amendment "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." U.S.S.G. App. C, Amend. 506, at 805 (Nov. 1994), *also published at* Amendment Notice, 59 Fed. Reg. 23,608, 23,609 (1994).

The Commission submitted Amendment 506 to Congress, along with a number of other proposed amendments, on April 28, 1994, and notice of these proposed amendments was published in the Federal Register on May 5, 1994. *See* Amendment Notice, 59 Fed. Reg. 23,608-23,610 (1994).[8] Congress took no action to modify or disapprove the amendment, and it became effective November 1, 1994. *See generally* 28 U.S.C. § 994(p).[9]

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[8] The Commission indicated that original notice of the amendments "was published in the Federal Register of December 21, 1993 (58 F.R. 67,521) [and a] public hearing on the proposed amendments was held in Washington, D.C., on March 24, 1994." Amendment Notice, 59 Fed. Reg. 23,608 (1994).

[9] The "report and wait" procedure that Amendment 506 went through pursuant to § 994(p) provides meaningful Congressional review. For example, Congress has declined to adopt other proposed amendments. *See, e.g.*, Pub. L. No. 104-38, 109 Stat. 334 (rejecting an amendment that would have changed the base offense levels applicable to money laundering offenses and rejecting an amendment that would have equalized the treatment of crack cocaine and powder cocaine).

In 1995, the Commission again fine tuned § 4B1.1. Amendment 528 was added to the "Background" section of § 4B1.1 to clarify that the Career Offender provisions of the Guidelines are based on 28 U.S.C. § 994(a)-(f), and its authority pursuant to § 994(o) and (p), as well as § 994(h). U.S.S.G. App. C, Amend. 528, at 830. *See also United States v. Damerville*, 27 F.3d 254, 256-57 (7th Cir.) (noting that § 4B1.1 stems from the Commission's authority under § 994(a) in addition to its authority under §994(h)), *cert. denied*, 115 S. Ct. 55 (1994); *United States v. Heim*, 15 F.3d 830, 832 (9th Cir.) (same), *cert. denied*, 115 S. Ct. 55 (1994); *United States v. Hightower*, 25 F.3d 183, 186 (3d Cir.) (same), *cert. denied*, 115 S. Ct 370 (1994). By clarifying that § 4B1.1 rests on the Commission's general authority under § 994(a), the Commission underlines its mandate to integrate the demands imposed by § 994(h) with the other guidelines goals and responsibilities.

In addition, Amendment 528 added the following language to the "Background" section of § 4B1.1:

> [T]he Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ." 28 U.S.C. § 991(b)(1)(B).

U.S.S.G. § 4B1.1, comment. (backg'd.) (ellipses in original). The Commission also indicated its position that its amendments to this section were in line with congressional

intent, noting:

> The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Id. (bracketed information in original). This amendment elucidates the Commission's position with respect to its authority to structure the Career Offender provision as it has, and its understanding that its actions comport with the legislative mandate and legislative intent.

II. Amendment 506 Does Not Violate Any Federal Statute and Constitutes a Legitimate Exercise of the Sentencing Commission's Authority and Expertise.

Amendment 506 does not violate 28 U.S.C. § 994(h), or any other federal statute, and the amended commentary should be accorded controlling weight. *Stinson v. United States*, 508 U.S. 36, 113 S. Ct. 1913, 1919 (1993). The two-part analysis from *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), supports this conclusion.

The Government can only impose its view of how to calculate the sentences of "career offenders" by pointing to an unambiguous expression of congressional intent that mirrors its view. *Chevron*, 467 U.S. at 842. This it cannot do. In fact, the Commission's "alternative" interpretation of the statutory mandate reflects a reasoned approach that integrates the directive contained in § 994(h) with the Sentencing Reform Act's other mandates. In short, the Commission accomplished exactly what Congress hoped it would,"a consistent and rational implementation of the [legislature's] view that [certain repeat offenders receive] substantial prison terms." S. Rep. No. 225, 98th Cong., 2d Sess. 175 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3358.

A. Amendment 506 Does Not Violate Unambiguously Expressed Congressional Intent.

The language of § 994(h) does not answer "the precise question[s] at issue[,]" *Chevron*, 467 U.S. at 842, that is, whether the call to sentence certain "categories of defendants" "at or near the maximum term authorized" requires the guidelines to be written in such a way as to assure that, if the prosecutor chooses to charge a given defendant with statutory enhancements, those statutory enhancements will serve as the basis for that defendant's "offense level" within the "career offender" guideline. The Government's position that this is, unambiguously, the only interpretation of § 994(h) does not withstand scrutiny.

The Commission's approach to calculating the offense level of "career offenders" constitutes a thoroughly reasonable means of implementing the directive to sentence certain "categories of defendants" "at or near the maximum term authorized." The existence of this compelling "alternative" interpretation of the statutory mandate indicates that the intent of Congress is not clear.

As the First Circuit noted, the "categories of defendants" at issue could be comprised of "those defendants charged with violations of similar statutes against whom prosecutors have filed notices of intention to seek sentence enhancements[,] *United States v. LaBonte*, 70 F.3d 1396, 1404-05 (1st Cir. 1995), *cert. granted*, 116 S. Ct. 2545 (1996), or "[t]he word 'categories' plausibly can be defined more broadly to include all offenders (or all repeat offenders) charged with transgressing the same criminal statute, regardless of whether the prosecution chooses to invoke the sentence-enhancing mechanism against a particular defendant[,]" 70 F.3d at 1405. A third interpretation would be that Congress intended comparable treatment for those "categories of defendants" charged with *either* a violent felony *or* a serious drug offense, who had previously been charged with two or more qualifying felonies.[10]

Nor is it self-evident, as the Government urges (Pet.

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[10] This interpretation, which directly tracks the statutory language, also serves the end of reducing unwarranted sentencing disparities among those defendants with comparable records found guilty of similar, or comparable, criminal conduct, as required by 28 U.S.C. § 991(b)(1)(B). *See* discussion *infra* part II.B.

Br. at 18), that the phrase, "at or near the maximum term authorized," *requires* the Guidelines to identify a career offender's "offense level" based on the "enhanced" statutory maximum. A similar argument was considered and rejected in *United States v. R.L.C.*, 503 U.S. 291 (1992). In that case, the Government asserted that the term "authorized" was unambiguous and "refers only to what is affirmatively provided by penal statutes, without reference to the Sentencing Guidelines[.]" *R.L.C.*, 503 U.S. at 297. The Court disagreed, stating that the Government's position "beg[s] the question," explaining: "The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory." 503 U.S. 291, 297 (1992) (citing 18 U.S.C. § 3553(b)).

As in *R.L.C.*, this case involves two potentially conflicting mandates, one derived from a statute, and one based in the Guidelines. In *R.L.C.*, the Court framed the issue before it aptly: "The question . . . is whether Congress intended the courts to treat the upper limit of such a penalty as "authorized" even when proper application of a statutorily mandated Guideline in an adult case would bar imposition up to the limit[.]" 503 U.S. at 297. In ruling against the Government in *R.L.C.*, the Court concluded:

> Here, it suffices to say that the Government's construction is by no means plain. The text is at least equally consistent with treating "authorized" to refer to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power.

503 U.S. at 298. Similarly, in this case, the "plain meaning" of the statutory directive to assign sentences at or near the "maximum term authorized" does not patently require that a career offender's "offense level" be based on an enhanced statutory maximum. Although the Government might like this to be the case, it is far from obvious that Congress intended this interpretation.

In sum, it cannot be said that the congressional mandate contained in § 994(h) "unambiguously expressed [the] intent of Congress." *Chevron*, 467 U.S. at 843.

B. Amendment 506 Embodies a Thoroughly Reasonable and Coherent Construction of the Statutory Directive Regarding Certain Recidivist Defendants.

Amendment 506 reflects a sensible and uniform approach to the sentencing of those designated as career offenders. Further, so long as this amendment is based on a "permissible construction of the statute[,]" it must be upheld. *Chevron*, 467 U.S. at 843.

Not only is the Commission's interpretation permissible, it provides the only means of assuring compliance with the statutory mandate to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 28 U.S.C. § 991(b)(1) (B). Because of the many

options available to prosecutors -- bringing, enhancing or reducing charges -- they are able to introduce unwarranted disparity into sentencing outcomes. Thus, the exercise of prosecutorial discretion frequently results in offenders with like records and similar culpability receiving different sentences, the anathema of sentencing reform.

One need look no further than the Sentencing Reform Act itself to see that Congress was concerned that prosecutorial discretion would perpetuate unjustified disparities in the treatment of similarly situated persons. Congress expressly expects judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S. Rep. 98-225, 98th Cong. 1st Sess. 63, 167 (1983). The Sentencing Commission, in response to the congressional directive in 28 U.S.C. § 994(a)(2)(E), advises judges not to accept charge bargains unless it is determined, "for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing." U.S.S.G. § 6B1.2(a).

The Government's reading of § 994(h) amplifies the virtually unreviewable prosecutorial discretion to determine sentences and undermine the Sentencing Guidelines. Professor Schulhofer and former Commissioner Nagel warn that "it is ... important to recognize the sentencing discretion which remains in the prosecutorial hands. If abused and unchecked, this discretion has the potential to create the disparities that sentencing reform was intended to prevent." Stephen Schulhofer & Ilene Nagel, *Negotiated Pleas Under*

the Federal Sentencing Guidelines: The First Fifteen Months, 27 Am. Crim. L. Rev. 231, 232 (1989). If the Guidelines did not base a career offender's "offense level" on the unenhanced statutory maximum, then two defendants, both convicted of a drug offense and having two prior qualifying felonies, at least one being a drug offense, could be treated entirely disparately based upon the prosecutor's whim. This differential treatment flies in the face of the congressional directive to avoid unwarranted sentencing disparities.

Amendment 506 eliminates other unwarranted disparities beyond those associated with prosecutorial discretion. For example, under the Government's interpretation of § 994(h), a defendant who was convicted for a third qualifying drug offense could receive an "offense level" based on an enhanced statutory maximum, while a defendant who was convicted of the same drug offense, who had previously been convicted of two violent felonies, would receive an "offense level" based on an unenhanced statutory maximum.

This differential treatment conflicts with the language of § 994(h) which mandates certain treatment for "categories of defendants in which the defendant" meets certain criteria. This section does not simply direct treatment for "defendants who" meet these criteria. This choice of language suggests that Congress expects these "categories of defendants" to receive comparable treatment under the Guidelines. That is, Congress directed that the Guidelines mete out equal treatment to those "categories of defendants" who are convicted of a crime of violence, and have two prior

convictions for controlled substances offenses, and those "categories of defendants" who are convicted of a third controlled substances offense. Interpreted in this manner, the Commission has done exactly what Congress intended.

Contrary to the Government's position, the Guidelines, in this case, fully satisfy the congressional objectives of substantial penalties for repeat offenders and consistency in treatment of those offenders who commit comparable crimes and who have comparable criminal histories.

Aside from the "reasonableness" of Amendment 506, that amendment protects defendants from unfair double counting. If the Government's position were adopted, a defendant subject to the Career Offender provision would have his criminal history counted against him twice -- first *via* a statutory enhancement and then by the automatic "enhancements" triggered by the career offender guideline. Such treatment is overly harsh, particularly considering that the Career Offender provision standing alone is strong medicine.[11] Requiring double counting may well violate the congressional mandate to insure that sentences imposed are "sufficient, but not greater than necessary," 18 U.S.C. §3553(a), to achieve the stated purposes of sentencing. Further, the Commission's interpretation of the Guidelines

[11] For example, a non-career offender with a criminal history Category III, who is held responsible for the distribution of 35 grams of cocaine base (offense level 30), has a guideline range of 121-151 months. By comparison, the guideline range applicable to a similarly-situated defendant who is designated a career offender is 262-327 months. *See* U.S.S.G. § 4B1.1.

allows for imposition of significant penalties based on career offender status while also providing a more individualized means of tailoring a sentence to the offense committed and the defendant's role in that offense.[12]

Finally, as noted above, § 4B1.1 was formulated to address a range of congressional objectives, beyond the dictates of § 994(h). *See* U.S.S.G. § 4B1.1, comment. (backg'd.). Consequently, the competing aims of eliminating unwarranted disparities, cabining prosecutorial discretion, not exceeding the capacity of the federal prisons, and achieving greater fairness and certainty, all must enter the Commission's calculus in formulating the Guidelines, including the Career Offender provision.

Where, as here, the Commission received congressional approval for Amendment 506, and where the amended commentary represents a rational implementation of the legislative mandate, and does not violate the Constitution or any federal statute, nor conflict with the guideline it interprets, that commentary governs. *Stinson*, 113 S. Ct. at 1919.

[12] The guidelines provide for individualized assessments of liability for offense characteristics, adjustments related to the victim, defendant's role, and any obstruction of justice, acceptance of responsibility and substantial assistance to the Government. Further, in cases in which a sentencing judge determines that the guidelines calculation does not adequately represent the relevant aggravating and mitigating circumstances, he or she may depart from the guidelines. 18 U.S.C. § 3553(b).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

UNITED STATES SENTENCING COMMISSION
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September 20, 1996

VIA FAX

Ms. Julie Stewart
President
FAMM Foundation
1612 K Street, N.W., Suite 1400
Washington, DC 20006

Dear Ms. Stewart:

Thank you for your letter of September 9, 1996 to Chairman Conaboy concerning the Sentencing Commission's possible intervention in United States v. LaBonte, a case currently before the United State Supreme Court in which the Government contests the validity of Amendment 506 to the sentencing guidelines. Chairman Conaboy asked me to respond to your letter.

The Sentencing Commission continues to have a keen interest in this matter. It has received several briefings from its Counsel at various stages of the litigation, including, most recently, an update at its September 19 meeting. At the early stages of this litigation, the Commission authorized its Counsel to informally advise and consult with attorneys advocating the validity of the amendment. Pursuant to this direction, our legal staff has had a number of substantive

discussions with counsel representing defendants impacted by Amendment 506, including counsel involved in the cases in which *certiorari* has been granted.

Based on these discussions, we have every confidence that the important issues in these cases will be well developed and effectively presented to the Court. Moreover, there appears to be no significant divergence of interests between the individual defendants and the Commission in regard to the validity of this particular amendment. Thus, the Commission has not felt it necessary to pursue formal intervention in this litigation.*

Thank you for your interest in this important issue.

Sincerely,

/s/

John R. Steer
General Counsel

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*The Sentencing Commission has always acknowledged the authority of the Attorney General under 28 U.S.C.§ 516, et. seq, in respect to litigation in which the United States is a party. With the permission of the parties and the Court, the Commission participated as an *amicus* in Mistretta v. United States, 488 U.S. 361 (1989), when the constitutionality of the Commission and the guideline system was at stake. Subsequently, the Commission has filed *amicus* briefs, with the permission of the Attorney General or through the Department of Justice, in a very limited number of cases involving the guidelines. The fact that the Commission's interests appear to be ably advanced by counsel for the defendants in these particular cases obviates any need to address procedural issues relating to possible Commission participation in this litigation.